UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 12 CR 876 (ALC)

PAUL CEGLIA,

Defendant.

----------x

New York, N.Y.
March 7, 2014
11:15 a.m.

Before:

HON. ANDREW L. CARTER, Jr.,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
CHRISTOPHER D. FREY
Assistant United States Attorney

DAVID E. PATTON
ANNALISA MIRON
Attorneys for Defendant

(Case called)

MR. FREY: Good morning, your Honor. Christopher Frey, for the government.

THE COURT: Good morning.

MR. PATTON: David Patton, for Mr. Ceglia, who is present, and also at counsel table is Annalisa Miron.

THE COURT: Good morning. Good morning, Mr. Ceglia.

The defendant has filed a motion to dismiss the indictment. I have a few questions for the parties and I believe I'll be ready to rule. In particular, Ceglia has argued that the right to petition the courts which shield him, immunize him from this prosecution under the Noerr-Pennington doctrine, and it seems from the submissions that both parties seem to agree that this doctrine applies to this case. Maybe I'm misreading that, but let me find out from the government. Is that your position?

MR. FREY: Your Honor, the government believes the Noerr-Pennington doctrine could potentially be implicated here, but it certainly doesn't agree that it shields the defendant in this particular case, because what is alleged is beyond mere litigation activity.

THE COURT: My question is the Noerr-Pennington doctrine is adopted in the context of antitrust litigation and all the cases that have stemmed from that have been in the context of antitrust litigation, indicating First Amendment

principles as they apply to antitrust litigation. I haven't seen any cases in which the Noerr-Pennington doctrine has been applied in a criminal context, unless I've missed something. But let me just hear a little bit more from both parties about that because, again, Noerr-Pennington is about shielding the right to petition, basically indicating that an entity or an individual has a right to petition the courts or petition the legislature even if the results of successful petition could have an anticompetitive effect, that that entity or that individual would be shielded from litigation under the Sherman Act. I'm not sure this applies to a criminal case. Again, I haven't seen any courts that have applied this to a criminal case, but let me hear more from the parties about this.

Let me give defense counsel an opportunity to address that first.

MR. PATTON: Sure, your Honor. I think Noerr-Pennington has been applied outside the context of antitrust suits. I mean, it certainly has. I can think of the NLRB instance where various government agencies have been prevented from stopping a lawsuit, regardless of whether or not it was subjectively filed for some sort of improper purpose, as long as it wasn't objectively baseless.

I can't think offhand of a case in which it's been raised in this context, where you have the government instituting a criminal action rather than some sort of civil

agency action that seeks to prevent somebody from following through on a civil lawsuit. Frankly, I think that just highlights the unusual nature of this criminal prosecution, that there are good reasons why you don't find criminal prosecutions of civil litigants generally speaking. So it certainly is applied outside of the antitrust context and it is applied broadly to provide immunity to civil litigants because of the concern about protecting the right to petition the courts. I can't cite the particular case preventing the government from proceeding criminally in a way that impacts the right to petition the courts because, frankly, it's so rare. And I don't know of any other instance in which it's been raised.

THE COURT: Thank you. Let me hear from the government.

MR. FREY: Your Honor, I'll agree with defense counsel that my understanding is that the Noerr-Pennington doctrine has been applied outside the antitrust context, but I also agree with your Honor that the government is not aware of any criminal case in which the Noerr-Pennington doctrine has been applied. My review of the case law certainly did not uncover any. I do think though that to the extent the Noerr-Pennington doctrine could be construed to apply in the criminal context, if we look to the body of civil case law that has developed, it makes very clear that looking at the allegations, the party

accusing one of engaging in sham litigation is enough for the Court to make a determination as to Noerr-Pennington. So I think if we were to draw an analogy, the Court could look to the government's allegations, the allegations that the grand jury returned in the indictment, and could make a determination as to whether or not the suit is objectively baseless, or not. But I think your Honor's correct, it has not been traditionally applied in criminal cases.

THE COURT: Anything else from the defense on that?

MR. PATTON: On that, your Honor, I disagree strongly that the Court can simply rely on allegations to pierce the immunity. The entire point of the immunity is to immunize this type of interference with the right to petition. The idea that the government can simply pick sides in a civil lawsuit and, based on the allegations alone, that's sufficient to pierce the immunity eviscerates Noerr-Pennington. At the very least, if the government's relying on the sham exception, they would have to make a factual showing to this Court to prove that it's objectively baseless.

You have a fully contested civil lawsuit that's ongoing where there are contested sets of facts, and this Court, I don't think, is in any position to find, based on nothing but the government's allegations, that that civil lawsuit has no chance of success, which is what's required in order to find that the suit is objectively baseless, as it

must, in order to pierce the immunity.

THE COURT: And I understand your motion to be asking for the Court to conduct some sort of evidentiary hearing, Noerr-Pennington hearing, and obviously, there are some cases in which it's indicated that the Court has the authority to conduct such a hearing. I haven't seen any cases in which a court has actually conducted such a hearing.

What would this hearing look like and why would this hearing be different than the evidence that would be produced at trial? One of my overarching concerns is about the timing of this motion. This is a motion to dismiss the indictment. Motions to dismiss indictments are generally disfavored. It seems to me that it is more appropriate to consider all of these factors and the other grounds that you had for dismissing the indictment in the context of a Rule 29 motion. At the close of the government's case or the close of all the evidence, couldn't I then have a real sense as to whether or not this is sham litigation? Assuming Noerr-Pennington applies, then couldn't I make a determination as to whether or not this was sham litigation and whether or not Noerr-Pennington immunity should apply?

It seems to me that it's one thing to say that Mr. Ceglia would be immunized from liability. It's another thing to say he's immunized from going through any of this process, and it seems that this motion that you're making is

premature. Along with that, I know this kind of long-winded, and I'll certainly give you a chance to address this, some of the other cases that you cited in terms of looking at the actual language of the mail fraud statute, for example, Pendergraft, which you relied heavily upon, which was in the context of a defendant who went to trial and the Eleventh Circuit, following the trial, dealt with both the issues of the district court's refusal to grant the motion to dismiss the indictment and the district court's refusal to grant an order of acquittal. And what the Eleventh Circuit did there, in Pendergraft, is said it was error for the district court not to grant the motion for acquittal and the Rule 29 didn't touch anything about a motion to dismiss indictment. So I guess my question is sort of related there. Why isn't this premature? Why can't this be determined in the context of a Rule 29 motion?

MR. PATTON: Your Honor, very simply because we're accepting all of the allegations of the government as true and it's well settled that if there's not a factual, if based on all of the government's allegations, accepting them as true, our arguments about the fraud statutes, leaving aside the Noerr-Pennington issue for a moment, there is no possible way to construe the government's allegations that constitute an offense under the federal fraud statutes. They're barred because, I mean, the government trips all over itself to try to

describe this as some sort of broader fraudulent scheme apart from a civil action. It's just not. They describe it entirely as part of the civil action in their venue motions that were earlier litigated. They describe it in sort of tortured language in their motions on this motion. But there is simply nothing, and I think many courts within the Second Circuit, including recently, Judge Matsumoto, Judge Cote, others have described cases involving alleged phony documents that were filed, alleged phony powers of attorney, witness intimidation, all sorts of things that involve phony and false litigation, including things that were prepared to be included in filings, and they say, Look, this isn't fraud. And there is nothing that the Court needs to hear in terms of any sort of factual foundation to make that decision now. The reason to make it now is obvious, to prevent all of the waste and expense of going through a trial that's based on claims that really shouldn't stand, even accepting all the government's claims.

THE COURT: But all of those cases were in the civil context, and all of those cases were dealing with the civil RICO statute and civil fraud, which, again, is very different from this situation in which obviously the civil case you can certainly grant a motion to dismiss readily, if you accept the factual allegations as true and it doesn't make out a cause of action. It's similar in a criminal context, but I think one of the things that troubles me is that under the mail fraud

statute, what's really important is Mr. Ceglia's belief, what Mr. Ceglia knew about whether or not this action would deceive Mr. Zuckerberg. The fact that you keep claiming that Mr. Zuckerberg knew that this was false and, therefore, could not have been deceived and that is certainly relevant, but that is not dispositive of the issue. So if Mr. Ceglia, for example, believed that, and I have no reason to think this is true, but if Mr. Ceglia believed that Mr. Zuckerberg had some sort of early onset Alzheimer's and wouldn't remember it, wouldn't know whether or not this was true, that would certainly be able to sustain a conviction for mail fraud, for example.

For example, in a related context, if someone is passing off counterfeit bills to an individual and they don't know that the individual they're giving counterfeit bills to is someone who is trained in identifying counterfeit bills, the fact that that person was not actually deceived doesn't make that the defendant's actions weren't fraudulent, and in Pendergraft the court there also relied heavily on that. In Pendergraft, the court said that the defendant knew that the intended victim would not be deceived, so the simple fact that Zuckerberg allegedly was not going to be deceived isn't quite enough, and in terms of me making that leap to say that Ceglia knew that Zuckerberg knew that this was false, that seems that's improper for me to do at this time and it seems like

that's something we need more evidence, and I guess a jury could consider that. And if there isn't enough evidence of that, or I find as a matter of law that the evidence that's been submitted is insufficient, then a Rule 29 motion would certainly be appropriate.

MR. PATTON: Your Honor, I think it's actually the reverse; that is, I understand what the Court is saying about how there might be some conceivable set of facts in which Mr. Ceglia's intent could be shown to be fraudulent or within the scope of the fraud, but it hasn't even been alleged. The government isn't alleging anywhere, in its papers, much less the four corners of the indictment, that Mr. Ceglia intended to deceive Zuckerberg into believing that it was a real contract. Instead, they rely on this notion that it's why they have to sort of really stretch the statutes and say, Well, that may be, but he could deceive the jury and the judge. And that's purely a matter of law. It's purely a matter of law that's foreclosed by some, I think, pretty persuasive case law. But the Court's decision at this point is are there allegations that suffice, even if entirely proved, would meet the elements of the fraud statute, and there aren't. There's no allegation and there clearly couldn't be because it's very different from the scenario of passing counterfeit money. The entire point of passing counterfeit money is to pass it and pass it off as real.

The government isn't alleging that here. They're alleging that it is simply a phony, sham litigation, and that's not fraud, and the Court needs no additional information to make that decision.

THE COURT: Thank you. I'll hear from the government.

MR. FREY: First of all, your Honor, I'll start with defense counsel's point that we haven't alleged an intent to deceive Mark Zuckerberg. I think that's patently untrue from the face of the indictment. The indictment alleges a scheme with a number of victims. It alleges both a fraud upon Mark Zuckerberg and Facebook, the company, being two separate individuals or entities, and it also makes allegations with respect to corrupting the judicial process, with respect to deceiving the district court, deceiving a jury who would decide the civil lawsuit into awarding Mr. Ceglia a monetary judgment in his favor and against those two victims, Mark Zuckerberg and Facebook. So the case law is very clear.

With respect to what is required on a motion to dismiss, the government has tracked the statutory language, but beyond that, it has provided specific allegations with respect to each of the elements of both mail fraud and wire fraud. I guess circling back to your Honor's initial question that started this discussion with Mr. Patton, with respect to what would an evidentiary hearing look like for Noerr-Pennington, I agree, I don't think it would look any different than a trial,

and in that respect, I think that the motion, really what Mr. Patton, is asking for is premature. The government should be allowed to present its evidence. This is a valid indictment on its face. It's sufficient to go to a jury. There's no basis for dismissing it now.

Your Honor, I think, highlighted the very clear case law with respect to intent to deceive, that the Second Circuit has held on multiple occasions that it is what the defendant intends, the harm that he intends to the victim. It is not whether or not the intended victim is actually defrauded or could be defrauded. It has to do with the defendant's bad intent and deceitful conduct, and the indictment certainly includes allegations of that.

I agree with your Honor as well. I think the civil RICO cases are very different. What seems to be animating the Court's decisions in those cases has to do with the fact that what was being alleged was just an attempt to relitigate something between those exact same parties in pending or ongoing litigation, long-standing disputes between those parties. That's certainly not the case here, and the court in determining that the mail and wire fraud predicates for purposes of civil RICO were not met in those cases was also largely animated by policy concerns that are wholly absent here. The concern with converting run-of-the-mill tort actions, malicious prosecution or abuse of process actions into

RICO predicates would open the floodgates of litigation in federal court, allowing unprecedented access to a statute that provides for treble damages. Those concerns are wholly lacking here.

The government, as I'm sure the Court is well aware from our papers, believes that this is much more akin to the criminal prosecutions both in Eisen in this circuit and the Seidling matter in the Seventh Circuit. This is more than just litigation activity. This is more than just the filing of a false affidavit. It has to do with the creation of evidence out of whole cloth, the destruction of evidence that's inconsistent with Mr. Ceglia's claims, and the manipulation of documentary evidence, all intended to work a fraud upon a civil jury and ultimately to obtain properly fraudulently from the Zuckerberg and Facebook defendants in that case.

THE COURT: Let me ask counsel for the government this. I haven't seen any cases sustaining a mail fraud or wire fraud conviction for attempting to deceive a judge or a jury. Do you have any such cases?

MR. FREY: Did you say a criminal case, your Honor?

THE COURT: Yes.

MR. FREY: No, but there is certainly some case law in the criminal context where the courts have held that a fraud on civil defendants also works a fraud upon the court and upon a jury. That's the Rodolitz case as well as --

Your Honor, just give me a moment.

THE COURT: Yes.

MR. FREY: -- as well as United States v. Coven, your Honor, which we cite in our papers. Those are Second Circuit cases where the Second Circuit has recognized that fraud may be worked on civil juries and courts as well as the litigants.

THE COURT: Let me ask defense counsel, going back to an earlier question, what this Noerr-Pennington hearing would look like. And why wouldn't this be different than trial?

MR. PATTON: Your Honor, the government would have the burden. The essential problem here is not just Noerr-Pennington, it's also the First Amendment. They're similar, but they're separate doctrines and separate concerns. The damage is being done now. If the criminal case is allowed to proceed and allowed to proceed to trial, we have an ongoing civil suit that's very different. I'm not aware of any case out there, I haven't found anything, involving a criminal prosecution of a civil litigant in an ongoing civil action. As far as I know, it's completely unprecedented. The damage to that immunity is being done now. The immunity is being pierced by the fact that they're sitting, and for the Court to allow that to go on longer, and however long, is piercing the immunity by truly restraining Mr. Ceglia's right to petition. I think at the very least, if the government is going to say we can pierce that immunity because this is sham litigation,

within the meaning of the case law, they've got to put forward evidence and they have got to put forward more than just allegations to provide this Court with a sufficient basis to make a factual finding that the civil suit in Buffalo actually is objectively baseless. And that would be on the government. They would have the burden of showing that, and whatever witnesses that they chose to call to meet that, but they have raised the sham exception as a defense to the immunity, and it's their burden to pierce that immunity. And for good reason, because of the highly unusual nature of this prosecution and because of the damage that the prosecution itself does to the right to petition and to Noerr-Pennington immunity.

If I could also just say one thing on the distinction between the civil cases, I grant there's not a large body of case law, again, precisely on point, and thank goodness. I mean, again, the idea that the government can come in and in the middle of a civil prosecution criminally prosecute somebody for the very issue that is being disputed in the civil suit is highly problematic, but to the extent that the government says don't look at those cases that have interpreted the fraud statutes in civil RICO settings because there were other concerns animating courts in those decisions and saying federal fraud statutes aren't covered by these litigation activities, it strikes me as a bit absurd to say those concerns should be

greater concerns than in the criminal context. Treble damages and civil liability and relitigating things in the civil context as opposed to somebody being criminally prosecuted, if anything, it's exactly the reverse. We should be much more concerned about how the fraud statutes are construed. They ought to be more narrowly construed in the criminal setting rather than the civil setting. Whatever concerns animate the courts in the civil context, they should be enhanced in this context, so it strikes me as an odd position for the government to take.

THE COURT: Let me just ask defense counsel this again. Why wouldn't the trial encompass all of these issues that you're talking about and then some? Obviously, the trial would be overinclusive of these issues. Why couldn't this be resolved? I understand why you say it shouldn't be resolved and why I shouldn't wait to make this determination. But other than the timing of that, what would be different in terms of this hearing that you're talking about as opposed to what would happen at a trial? Obviously, the trial's going to have a lot more evidence produced. Obviously, at a trial, the government has the burden of proof beyond a reasonable doubt, higher than this burden. But all the factors you're talking about, if at some point I were to adopt what you're saying, why wouldn't all that be covered in the context of a trial as a legal matter, and, after the trial is over, I could make a determination as

to whether or not this immunity applies or whether or not as a matter of law there's enough evidence here for a reasonable jury to convict him under the mail fraud statute?

MR. PATTON: Your Honor, because if what your Honor is asking is wouldn't there be a lot of overlap, there certainly well may be. I assume there would be. But that doesn't change the fact that in order for the government to proceed with this prosecution, and there's no question that Noerr-Pennington immunity applies to this situation, they are required to make a factual showing. There's nothing this Court can hang its hat on to say, yes, that's objectively baseless litigation in Buffalo. There's no possible way for this Court to say that in order to allow the prosecution to proceed. You've got nothing before you other than conclusory statements. There has to be a factual finding in order to support the government's claim that the sham exception should apply. It's their burden.

THE COURT: Let me ask you this. I understand the position that this Noerr-Pennington immunity, if it applies, should have even greater weight in the criminal context as opposed to the civil context. But as a procedural matter, what about the fact that what you're asking me to do here is to dismiss an indictment, an indictment by a grand jury, which is a lot different than dismissing a cause of action in a complaint that is simply just drafted by an attorney? There seems to be a real difference there and it seems that the

indictment at this point has satisfied what it needed to satisfy in terms of giving Mr. Ceglia notice as to the charges against him. It certainly meets the requirements of an indictment. What about that? Shouldn't that be something I should be concerned about?

MR. PATTON: Of course, the Court should be concerned about it, but I think this falls squarely within the rules of procedure on what's an appropriate motion to dismiss, and, frankly, I'd be happy to go back and provide the Court, because there are certainly many examples of indictments that have been dismissed because they failed to state a claim, because even accepting all of the allegations as true, just as in this case, that the statute can't be construed to cover that conduct. I grant it's unusual. Hopefully, it's unusual. Hopefully, the government is generally in the business of alleging facts that do fall within the parameters of criminal statutes. So I grant it's not as common as in the civil context, but that doesn't make it any less appropriate when circumstances warrant, and here they do. There are no factual disputes. We haven't taken issue with anything the government, I mean, we're not accepting that they're true, but for purposes of our legal arguments, we're not taking issue with any of the facts as alleged.

THE COURT: No, I understand. But it seems that, again, you've got two different tracks going on here. Obviously, your first couple of arguments deal with the actual

mail fraud statute itself, and I think I disagree. Maybe there's no disagreement in terms of a legal analysis, in terms of it's necessary for Mr. Ceglia to have the intent to deceive, and whether or not the intended victim is actually deceived, or not, is not really relevant to the consideration. It's your position that, based on what the government is indicating thus far, it's objectively reasonable to assume that Ceglia did not intend to deceive. But obviously the government is not limited to whatever it's put in its opposition papers in terms of the proof that they can present at trial. And if it's a substantial variance from what's in the indictment, that's another issue. That's something again that doesn't get resolved typically on a motion to dismiss. That gets resolved in a Rule 29 context.

In terms of the Noerr-Pennington immunity, and I'm still doubtful that that actually applies here, but assuming that it does apply in a criminal context such as this, that's not really an issue in which you're saying that the government has failed to state a claim. You're saying that the government has stated a crime but that he is immune from the crime, which is very different. It makes a huge difference in terms of when this should be resolved, and it seems to me that this is more properly resolved at a later date and in a Rule 29 motion.

Again, I know this is a rare situation. At least it appears to be a rare situation, but I'm certainly not aware of

any cases in which any court has dismissed a mail fraud indictment in this sort of situation, and I'm sure that if you were aware of one, you would have cited one to me. But I don't have any cases like that. Do you have any cases like that? I certainly didn't see any in the briefs and I haven't found any. I've found the cases again where the circuits courts, after a trial, have decided that the motion for acquittal should have been granted. But I haven't found any cases in which a circuit court has said that the indictment should have been dismissed.

MR. PATTON: But there are certainly many cases in which district courts have dismissed indictments.

THE COURT: Yes.

MR. PATTON: And properly so and have been upheld.

THE COURT: Don't mistake me as saying that it's always improper for a court to dismiss the indictment. I'm not saying that at all. I'm saying in this particular situation it seems that it's inappropriate.

MR. PATTON: Obviously, we think otherwise on that.

If I could go back to the Noerr-Pennington issue for a moment, first of all, in terms of its use in a criminal context, I mean, antitrust itself can be used in criminal antitrust contexts, in fact. So the criminal/civil distinction I don't think is significant just broadly speaking. And I guess if the Court is concerned about the appropriateness of the timing of determining this issue now as opposed to during

or after a trial, I'd ask for the opportunity to submit some examples of cases involving dismissals of indictment that I think are on point in terms of the general notion that where there's no dispute about the facts, it's appropriate to decide it now rather than at trial.

THE COURT: I don't think that's necessary. I'm still not convinced that Noerr-Pennington applies in the first place.

MR. PATTON: I'm referring to our fraud --

THE COURT: Right, and I think that, again, it seems to me that there are scenarios in which it seems that you're asking me to determine a factual issue and determine that Mr. Ceglia had no intent to deceive at this point. You're asking me to make that determination based on what the government has alleged in its moving papers and based on the indictment.

MR. PATTON: Just as in Norton, just as in Pendergraft, there is no, and the government doesn't stand up here and say, yes, we're saying that Ceglia was trying to deceive. I mean, nowhere in their more expansive motions papers or in the indictment or in the complaint have they said that the scheme involved Mr. Ceglia attempting to deceive Mark Zuckerberg into believing this contract was real. And, of course, they can't say that, and the reason they can't say that is it would be absurd, and regardless of whether they can say it, they haven't, and they haven't put that forward as an

allegation, which they would have to. There is no allegation that Mr. Ceglia intended to deceive Mark Zuckerberg. There just isn't.

THE COURT: I guess I'm confused as to why you keep saying that. That's in the indictment, the intent to deceive. I understand that you have a different view of the responses in their moving papers, but, fine, tell me. Is that element not listed in the indictment? Don't they track the statute?

MR. PATTON: They track statutory language, but nowhere in the indictment or in their papers do they say, the entire basis of the indictment and their papers, and all of the allegations that they make, have to do with the attempt to either get a jury to make an award -- and again, this isn't in the indictment; this is additional language in their papers -- or to induce some sort of settlement, but there's no factual support for that. But regardless, nowhere do they take the step of saying the scheme involved trying to deceive Mark Zuckerberg into believing that these false statements were, in fact, true.

THE COURT: I understand. But I don't think they're required to do that at this point. As long as it tracks the statutory language, he's on notice of what's there. Whether or not they can prove that, that's something that gets resolved on Rule 29. It seems that the government has at least indicated that in the indictment. They've indicated that. Perhaps you

feel that their language is a little conclusory and some of the circumstances they've put in the indictment and some of the other things they've put in there seem to contradict that.

MR. PATTON: I don't think they've even indicated it. I think that put to the question, they can't possibly say that. They can't possibly say the scheme to defraud was to deceive Mark Zuckerberg. I suppose the Court could put it to them: Are you saying that the scheme to defraud involved an intent to deceive Mark Zuckerberg.

THE COURT: Any response from the government?

MR. FREY: A few responses, if I may, your Honor.

First of all, I think the indictment clearly alleges that this is a scheme to defraud Facebook, Inc., and Mark Zuckerberg. That's paragraph four of the indictment. The indictment's allegations go on then to describe how, the means and methods by which Mr. Ceglia intended to work fraud on those entities, and then, as your Honor has well noted, the indictment tracks the statutory language. And so all of the elements for a sufficient indictment are present here. There is no basis on that ground for dismissing the indictment.

The case law, again, is also clear, as your Honor has already noted, that with respect to the scheme to defraud, it is Mr. Ceglia's intent to defraud that is relevant. It is an intention to work harm on the victims. I think your Honor appreciates the point, so I won't belabor it.

If I may just respond to the Noerr-Pennington argument again.

THE COURT: Yes.

MR. FREY: Again, I agree it is not clear at all that it applies in the criminal context. There certainly is a dearth of case law, no case law that either party can find in the criminal context, it seems, at this point. But what is clear is, first of all, there is no damage being done here, as Mr. Patton represents, with respect to Mr. Ceglia's First Amendment rights. He's continuing to pursue his civil litigation. The government has not stayed his civil litigation. In fact, Mr. Ceglia has gone so far as to pursue another civil litigation, suing the government for bringing this criminal prosecution against him. So there's no chilling effect here.

With respect to the case law on the Noerr-Pennington doctrine, in the civil context, at least, in which this doctrine has developed, it is clear that the objectively baseless prong is satisfied if the litigant didn't have probable cause to institute the underlying lawsuit. Where there's no dispute over the facts, courts have decided that question as a matter of law. Now, here, obviously, there is a dispute as to facts, and similarly, where that is the case, the Court's probable cause analysis, courts have held, can be based on allegations by the party claiming it to be a sham. In the

civil context, the courts have looked to the complaint or the answer, depending on who is alleging it to be a sham. The government has more than sufficiently pled allegations here that similarly would allow this Court to make that determination. The grand jury, as your Honor noted, returned an indictment and the Court can certainly look to that.

I think the government has satisfied its burden and the evidentiary hearing would not look any different, quite frankly, than a trial.

MR. PATTON: Your Honor, could I just make one point.

THE COURT: Yes.

MR. PATTON: It strikes me as remarkable that the government would claim that instituting a criminal prosecution doesn't have a chilling effect on the civil action. Regardless of whether Mr. Ceglia has quietly walked away or dropped it or has, in fact, been coerced into walking away from the civil suit because of the criminal, that doesn't mean it doesn't have a chilling effect. I think the chilling effect is self-apparent, so that strikes me as a bit remarkable, to say that there's no chilling effect on criminally prosecuting somebody, an active civil litigant for their civil litigation activities.

THE COURT: Thank you very much. I'm ready to rule.

A defendant faces a high standard in seeking to dismiss an indictment. That's United States v. Post, No. 8 Cr.

243 2013 WL 2934229 at *5 (S.D.N.Y. June 3, 2013). Under Federal Rule of Criminal Procedure 7(c)(1), an indictment need only consist of "a plain, concise, and definite written statement of the essential facts constituting the offense charged." An indictment is sufficient so long as, one, "contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend," and, two, "enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974). "An indictment must sufficiently inform the defendant of the charges against him and provide enough detail that he may plead double jeopardy in a future prosecution based on the same set of events," but it "need not be perfect, and common sense and reason are more important than technicalities."

The indictment need only allege "the 'core of criminality' the government intends to prove" at trial, and, consequently, the indictment is "read to include facts which are necessarily applied by the specific allegations made." United States v. Rigas, 490 F.3d 208, 229 (2d Cir. 2007).

Before trial, the allegations of an indictment must be taken as true. Boyce Motor Lines v. United States, 342 U.S. 337, 343, n.16 (1952). "The sufficiency of the evidence is not a matter that may be appropriately addressed on a pretrial motion to dismiss an indictment." United States v. Alfonso,

143 F.3d 772, 777 (2d Cir. 1998). This is because indictments are "not meant to serve an evidentiary function," but rather, "to acquaint the defendant with the specific crime with which he is charged and allow him to prepare his defense." United States v. Juwa, 508 F.3d 694, 701 (2d Cir. 2007).

Mr. Ceglia raises four arguments in support of his motion to dismiss. I'll address each one in turn.

First, Ceglia contends that false claims in litigation documents cannot form the basis for mail and wire fraud charges. In support of this argument, Ceglia cites to several civil cases in which courts rejected a plaintiff's ability to use mail and wire fraud as a predicate offense for a civil RICO claim, when a defendant's only alleged fraud was to perpetrate false litigation. I do not find these civil cases persuasive in determining whether to dismiss the indictment.

The only criminal case the defendant cites to in this regard is United States v. Pendergraft, or at least the main case the defendant cites to, 297 F.3d 1198, 1208 (11th Cir. 2002). In that case, however, the court only commented on this issue in *dicta*. The defendants' mail fraud conviction was vacated on other grounds. As the government notes, in the Second Circuit, convictions for mail and wire fraud have been upheld in similar circumstances. United States v. Eisen, 974 F.2d 246 (2d Cir. 1992); United States v. Rodolitz, F.2d 77 (2d Cir. 1986). I will note, however, that in those cases, the

defendants' schemes to defraud at least initially included the mailing or transmission of fraudulent documents in a nonlitigation context.

In his reply briefs, Ceglia argues that the judicial function exception to the False Statements Act, 18 U.S.C. Section 1001, applies to mail and wire fraud. Congress specifically codified that exception in the False Statements Act, and I have found no authority, nor has Ceglia cited any, extending its application to other fraud statutes, specifically mail and wire fraud.

Second, Ceglia argues that he could have no "intent to deceive" when Zuckerberg was aware of Ceglia's misrepresentations and could not possibly be deceived by them. Ceglia supports this proposition with Norton v. United States, 92 F.2d 753 (9th Cir. 1937) and Pendergraft out of the Eleventh Circuit. While those cases are interesting and persuasive, they are not binding on this Court.

The government argues that even if Zuckerberg could not have been deceived, Facebook certainly could have. Pendergraft forecloses that argument, but it's not binding on this Court.

Next, the government suggests that Ceglia intended to deceive the judge and jury in his allegedly fraudulent action. I haven't found any cases sustaining a mail and wire fraud conviction for attempting to deceive a judge or a jury.

Third, Ceglia argues that he did not use the mails and wire transmissions "in furtherance" of his fraud, as required by the mail and wire fraud statutes. Taking the allegations in the indictment as true, it certainly appears to me that the government has alleged enough to show that the mail and wire transmissions were in furtherance of Ceglia's allegedly fraudulent scheme.

Finally, Ceglia argues that the First Amendment prohibits this prosecution because it impermissibly restricts speak and infringes on his right to petition. Insofar as the restriction on speech is concerned, the Supreme Court has made clear in Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003), that the First Amendment does not shield knowingly false statements made as part of a scheme to defraud. The Second Circuit followed that precedent in United States v. Rybicki, 354 F.3d 124 (2004) when it echoed that "fraud is not conduct protected by the First Amendment."

Ceglia's argument as to the right to petition the courts is a little more concerning. Both sides seem to agree that the Noerr-Pennington doctrine shields litigation activity in a commercial context, except where the litigation is a sham. The government asserts that the litigation is, in fact, a sham and that Ceglia is not entitled to immunity as a result. Ceglia, in return, has urged me to hold a hearing, and I have determined that I am not going to hold such a hearing. It does

appear to me that if Noerr-Pennington immunity is something I have to determine, it would be more appropriately raised at the end of trial once all the evidence is in. It's inappropriate for me to make factual determinations about the government's evidence at this early stage. Therefore, Ceglia's motion to dismiss the indictment is denied.

Where are we at this point now? I've denied the motion to dismiss. How do the parties wish to proceed?

MR. FREY: Your Honor, the government has completed the production of discovery. The case has been pending for some time, so the government would request that we set a trial date at this juncture.

THE COURT: How does defense counsel want to proceed?

MR. PATTON: Your Honor, I'm okay with setting a trial date, but I think there are a few steps between here and there. One is that we had asked for a motion schedule specifically on this motion but reserving our right on other motions. There is a considerable amount of discovery in this case and a considerable potential other motions relating more specifically to the discovery, aside from our broader challenge to the suit. I guess I would ask for a motion schedule, a deadline. I don't have anything specific in mind, but I'd at least ask for a motion schedule and then we can go from there. If it's the Court's preference to also set a trial date now or to set one, we can come back at that time. I'm indifferent.

THE COURT: I think it's preferrable to set the trial date at a later time. Let me get a sense from the parties that if this case does, in fact, proceed to trial how long this trial will be.

MR. FREY: I would think the government's case would be somewhere in the order of two to two and a half weeks.

THE COURT: Defense counsel, do you have any sense yet as to whether or not you have a case? And if so, how long?

MR. PATTON: It's hard to say, your Honor. My guess is that it might not look too dissimilar from the civil suit in which case there is a likelihood of a defense case and that may involve expert witnesses and factual witnesses. I'd say in terms of the spectrum of likelihood as compared to most criminal cases, there's probably more of a likelihood of a defense case and a significant one in this case.

THE COURT: Why don't we do this. Since the discovery is extensive, what I could do is adjourn this matter for a couple of months and give the defense an opportunity to continue to review the discovery and figure out which motions you plan on making and then we can reconvene and we can set a motion schedule at that point. How does that sound to the parties?

MR. PATTON: That's fine, your Honor.

MR. FREY: Your Honor, the government would really like a motion calendar to be set now and would also like a

trial date. The reality is this defendant was arrested at the end of 2012. It is now 2014. Mr. Patton has been making his motions in piecemeal. He made first a motion to transfer venue. That was denied. He then asked for time to make a motion to dismiss the indictment. That has now been denied. To the extent that Mr. Patton has other motions, the government thinks he should promptly make them. Discovery was principally produced at the end of 2012. While it is voluminous, there's no reason why Mr. Patton should not be, in short order, prepared to make whatever motions remaining that he may have. The government would also, just for planning purposes, like to be able to know that it has a firm trial date in this matter.

THE COURT: Mr. Patton, anything else on that?

MR. PATTON: No, your Honor.

THE COURT: I take it from earlier conferences in this case that the government is going to have expert witnesses as well.

MR. FREY: I think that's probably likely, that we would have probably one expert witness, possibly two, but I suspect there will be one.

THE COURT: Let's do this. I will give Mr. Patton a couple of months to figure out which motions he wishes to make, but let's try to get all the motions together in one big bundle if we can. Let's just do that. Let's get a date two months from now. I understand the government's desire for a trial

date, and obviously I want to give a trial date. Once I set a trial date, it will be a firm trial date, and I want to make sure that we've dealt with everything before I just give an arbitrary trial date. I'm not sure what motions Mr. Patton is contemplating at this point, but with the experts that both parties anticipate, I'm sure that at some point we're going to have some Daubert hearings and other things we're going to have to deal with.

Could we get a date two months from now, Tara.

THE DEPUTY CLERK: May 6 at 10 a.m.

THE COURT: Does that date and time work for both parties?

MR. FREY: That's fine, your Honor.

MR. PATTON: Fine, your Honor.

THE COURT: Based on the representations made by counsel, and since this is for Mr. Patton to continue to examine the voluminous discovery in this case, and I find this is a complex case, based on the amount of discovery in this case and also based on the location of certain documents, I find it's in the interest of justice and the interest of Mr. Ceglia to exclude time under the Speedy Trial Act from today's date until May 6. I further find that the interests of justice and Mr. Ceglia's interests outweigh the public's interest in a speedy trial and I will enter an order to that effect.

Is there anything else from the government?

MR. FREY: Not from the government, your Honor.

THE COURT: Anything else from the defense?

MR. PATTON: No, your Honor. Just to clarify. On the sixth, we are to inform the Court of any additional motions?

THE COURT: Correct.

Obviously, Mr. Ceglia, obviously, you are welcome to come to court as many times as you want to. I know I previously ruled before, and that ruling still stands, if you have financial constraints or issues that make it difficult for you to appear, I will allow you to waive your appearance or appear by telephone, however you wish to proceed.

Thank you very much.

(Adjourned)